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Vegnesh a/l Ramnaidu v Ketua Polis Negara, Malaysia

B HIGH COURT (IPOH) — CRIMINAL APPLICATION NO AA-44–34–07 OF 2022
SU TIANG JOO JC
28 OCTOBER 2022

C *Preventive Detention — Detention — Application for habeas corpus — Police officer had reason to believe that there were grounds for detention under s 6(1) of Dangerous Drugs (Special Preventive Measures) Act 1985 — Applicant was arrested pursuant to s 3(1) of Dangerous Drugs (Special Preventive Measures) Act 1985 — Applicant's detention extended pursuant to s 3(2)(a), (b) and (c)*
D *— Whether the object of the Dangerous Drugs (Special Preventive Measures) Act 1985 Act should be read into s 3 of the Act — Whether the sequential progression of legal detentive power under s 3 of Dangerous Drugs (Special Preventive Measures) Act 1985 Act must be scrupulously complied with — Whether detention was lawful — Dangerous Drugs (Special Preventive Measures) Act*
E *1985 ss 3(1), 3(2)(a), (b), (c) & 6(1) — Federal Constitution art 149*

The applicant was arrested by one ASP Segaran pursuant to s 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act') because ASP Segaran had reason to believe that there were grounds for the applicant's
F detention under s 6(1) of the Act ie, that the applicant had been or was associated with any activity relating to or involving the trafficking in dangerous drugs. The applicant's detention had been extended several times, firstly under s 3(2)(a) of the Act whereby with the authority of an inspector of police, the applicant was detained beyond 24 hours. The second extension pursuant to
G s 3(2)(b) of the Act was authorised by ASP Segaran whereby the applicant was detained beyond 48 hours. Lastly, pursuant to s 3(2)(c) of the Act, DSP Nazeri had reported the circumstances of the arrest and detention of the applicant to ACP Shahidi, and upon the latter satisfied that there were grounds for the applicant to be detained pursuant to s 6(1) of the Act because the applicant
H together with a substantial body of persons had been associated with an activity relating to or involving trafficking in dangerous drugs, he had reported the same to the Minister of Home Affairs who had subsequently approved the extension of applicant's detention for 14 days. Thereafter, the applicant had filed notice of motion for a writ of habeas corpus to be released from detention
I with immediate effect. The applicant submitted that there was non-compliance with s 3(1), 3(2)(a) and 3(2)(b) read together with the preamble of the Act and art 149 of the Federal Constitution. The applicant further argued that his arrest was not premised on any belief that 'the applicant's activities' involved a 'substantial body of persons'.

Held, allowing the applicant's application for writ of habeas corpus:

(1) In line with the decision of the Federal Court in *Selva Vinayagam a/l Sures v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2021] 1 MLJ 601, the object of the Act should be read into s 3 of the Act in order to give this section the meaning intended by Parliament. It logically followed that for the purposes of ss 3(1), 3(2)(a) and (b) of the Act, in any arrest and subsequent detention, two of the three key ingredients identified and held by the Federal Court in the said case (ie, firstly, the activity which had been taken or was being threatened by a substantial body of persons relating to or involving trafficking in dangerous drugs, and secondly, the suspect was a member of a substantial body of persons), formed part of the object of the Act and should be read into s 3 of the Act in order to give it the meaning intended by Parliament. In addition, it could not be denied that the detention of the applicant began from the moment of him being arrested pursuant to s 3(1) of the Act (see paras 40–41 & 43).

(2) The structure of the legal detentive power in s 3 of the Act was expressed to be sequential in nature. The inference to be drawn from the provisions of s 3 of the Act was clear. Parliament acknowledged the drastic power given to restrict the liberty of a subject without having to bring him to a court and had put in place safeguards by expressly providing that this power or arrest was placed in the hands of a police officer with the rank of at least that of an inspector, and authority for each incremental period of detention having to be sought from a correspondingly higher authority up till that of the Minister. Each sequential progression must be scrupulously complied with by those entrusted with such power and the exercise of this power within the framework of the preventive detention laws housed within the Act was objectively justiciable (see paras 48 & 53–54).

(3) In the present case, whilst the element of having associated or was being involved in trafficking in dangerous drugs activities together with a substantial body of persons was present for the applicant's further detention of 14 days pursuant to s 3(2)(c) of the Act, however, this element for purposes of his arrest, as well as his subsequent detention for more than 24 hours, followed by a further 48 hours was noticeably absent. It followed that his arrest and his subsequent detention were unlawful (see para 55).

[Bahasa Malaysia summary

Pemohon telah ditangkap oleh ASP Segaran menurut s 3(1) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 ('Akta tersebut') kerana ASP Segaran mempunyai sebab untuk mempercayai bahawa ada alasan yang mewajarkan penahanan pemohon di bawah s 6(1) Akta tersebut iaitu, bahawa pemohon pernah ada atau sedang ada kaitan dengan apa-apa aktiviti yang

berhubungan dengan atau yang melibatkan pengedaran dadah berbahaya. Penahanan pemohon telah dilanjutkan beberapa kali, pertama di bawah s 3(2)(a) Akta tersebut di mana dengan kuasa Inspektor polis, pemohon telah ditahan melebihi 24 jam. Lanjutan kedua menurut s 3(2)(b) Akta tersebut telah diluluskan oleh ASP Segaran di mana pemohon telah ditahan melebihi 48 jam. Akhir sekali, menurut s 3(2)(c) Akta tersebut, DSP Nazeri telah melaporkan keadaan penangkapan dan penahanan pemohon kepada ACP Shahidi, dan apabila ACP Shahidi berpuas hati bahawa terdapat alasan untuk pemohon ditahan menurut s 6(1) Akta tersebut kerana pemohon bersama-sama dengan sekumpulan besar orang telah dikaitkan dengan aktiviti yang berhubungan dengan atau yang melibatkan pengedaran dadah berbahaya, dia telah melaporkan perkara tersebut kepada Menteri Dalam Negeri yang kemudiannya telah meluluskan lanjutan penahanan pemohon selama 14 hari. Selepas itu, pemohon telah memfailkan notis usul untuk memohon writ habeas corpus agar dia dibebaskan daripada tahanan berkuat kuasa serta-merta. Pemohon berhujah bahawa terdapat ketidakpatuhan kepada s 3(1), 3(2)(a) dan 3(2)(b) dibaca bersama mukadimah Akta tersebut dan perkara 149 Perlembagaan Persekutuan. Pemohon seterusnya berhujah bahawa penahanannya tidak berdasarkan apa-apa kepercayaan bahawa 'aktiviti pemohon' melibatkan 'sekumpulan besar orang'.

Diputuskan, membenarkan permohonan pemohon untuk writ habeas corpus:

(1) Selaras dengan keputusan Mahkamah Persekutuan dalam *Selva Vinayagam a/l Sures v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2021] 1 MLJ 601, objektif Akta tersebut hendaklah dibacakan ke dalam s 3 Akta tersebut bagi memberikan seksyen ini maksud yang diinginkan oleh Parlimen. Secara logiknya, bagi tujuan s 3(1), 3(2)(a) dan (b) Akta tersebut, dalam mana-mana penangkapan dan penahanan berikutnya, dua daripada tiga elemen utama yang dikenal pasti dan diputuskan oleh Mahkamah Persekutuan dalam kes tersebut (iaitu, pertama, aktiviti yang telah dibuat atau sedang diancam oleh sekumpulan besar orang yang berhubungan dengan atau yang melibatkan pengedaran dadah berbahaya, dan kedua, suspek adalah ahli kepada sekumpulan besar orang tersebut), membentuk sebahagian daripada objektif Akta tersebut dan hendaklah dibaca ke dalam s 3 Akta untuk memberikan maksud yang diinginkan oleh Parlimen. Selain itu, tidak dapat dinafikan bahawa penahanan pemohon bermula dari saat dia ditangkap menurut s 3(1) Akta tersebut (lihat perenggan 40–41 & 43).

(2) Struktur kuasa untuk menahan di bawah undang-undang dalam s 3 Akta tersebut dinyatakan secara berurutan. Inferens yang boleh dibuat daripada peruntukan s 3 Akta tersebut adalah jelas. Parlimen mengakui kuasa drastik yang diberikan untuk menyekat kebebasan seseorang individu tanpa perlu membawanya ke mahkamah dan telah meletakkan

perlindungan dengan cara memperuntukkan secara jelas bahawa kuasa atau penangkapan ini diletakkan di tangan seorang pegawai polis yang berpangkat sekurang-kurangnya Inspektor, dan kuasa bagi setiap tempoh penahanan tambahan perlu dimohon daripada pihak yang mempunyai kuasa yang lebih tinggi sehinggalah kepada Menteri. Setiap perkembangan yang berurutan tersebut mesti dipatuhi dengan teliti oleh mereka yang diamanahkan dengan kuasa tersebut dan penggunaan kuasa ini dalam rangka kerja undang-undang penahanan pencegahan yang terkandung dalam Akta tersebut secara objektifnya boleh dibicarakan (lihat perenggan 48 & 53–54).

(3) Dalam kes ini, walaupun elemen mempunyai perhubungan atau terlibat dalam aktiviti pengedaran dadah berbahaya bersama-sama dengan sekumpulan besar orang adalah wujud untuk membolehkan lanjutan penahanan pemohon selama 14 hari menurut s 3(2)(c) Akta tersebut, namun, untuk tujuan penangkapannya, serta penahanannya yang berikutnya selama lebih daripada 24 jam, diikuti dengan 48 jam lagi, elemen ini tidak dibuktikan. Oleh yang demikian, penangkapan dan seterusnya penahanan pemohon adalah menyalahi undang-undang (lihat perenggan 55).]

Cases referred to

Dhinesh a/l Tanaphll v Lembaga Pencegahan Jenayah & Ors [2022] 3 MLJ 356; [2022] 5 CLJ 1, FC (refd)

Johannes Choeldi & Ors, Ex Parte [1960] 1 MLJ 184 (refd)

Kantha Rao a/l Subramaniam lwn Ketua Polis Negara, Malaysia dan satu lagi [2022] MLJU 1942; [2022] 1 LNS 1898, HC (refd)

Lee Kew Sang v Timbalan Menteri Dalam Negeri Malaysia & Ors [2005] 2 MLJ 631; [2005] 3 CLJ 914, HC (refd)

Lei Meng v Inspektor Wayandiana bin Abdullah & Ors and other appeals [2022] 3 MLJ 203; [2022] 3 CLJ 177, FC (refd)

Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals [2002] 4 MLJ 449; [2002] 4 CLJ 309, FC (refd)

Muhamad Bilal bin Salim v Ketua Polis Negara, Malaysia & Anor [2022] MLJU 1283, HC (refd)

Muhammad Hafiz bin Abd Halim v Ketua Polis Negara, Malaysia & Anor [2022] MLJU 1570; [2022] 1 LNS 1542, HC (refd)

Muhammad Jailani bin Kasim v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors [2006] 6 MLJ 403; [2006] 4 CLJ 687, FC (refd)

Ng Hong Choon v Timbalan Menteri Hal Ehwal Dalam Negeri & Anor [1994] 3 MLJ 285; [1994] 4 CLJ 47, SC (refd)

Selva Vinayagam a/l Sures v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2021] 1 MLJ 601; [2021] 2 CLJ 29; [2021] 1 MLRA 83, FC (refd)

Tee Yam @ Koo Tee Yam v Timbalan Menteri, Menteri Keselamatan Dalam Negeri, Malaysia & Ors [2005] 5 MLJ 645; [2005] 6 CLJ 550, HC (refd)

A *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759; [2021] 5 CLJ 581, FC (refd)

Legislation referred to

Dangerous Drugs (Special Preventive Measures) Act 1985 ss 3, 3(1), (2)(a),
B (2)(b), (2)(c), (3), (4), 5(4), 6(1)
Dangerous Drugs Act 1952 s 2
Federal Constitution arts 5, 5(1), (2), (3), 149
Interpretation Acts 1948 and 1967 s 17A
Prevention of Crime Act 1959 s 3(1)

C

Danial bin Amir (with Zafran Zafri bin Mohd Zaini) (Zafri & Partners) for the applicant.
Nuur Izham bin Ismail (Legal Advisor's Office, Ministry of Home Affairs) for the respondents.

D

Su Tiang Joo JC:

INTRODUCTION

E **[1]** The applicant moved the court by notice of motion dated 18 July 2020 (encl 1) for a writ of habeas corpus to be released from detention with immediate effect. On 18 October 2022, this court decided to allow his application and these are the grounds for the decision.

F BACKGROUND

[2] I set out below a narrative of the facts distilled from the affidavits filed; one by the applicant (encl 3) and seven by the respondents (encls 5, 6, 7, 8, 9, 10 and 11).

G

[3] The applicant was arrested by ASP V Sagaran a/l Verapatran ('ASP Sagaran') on 23 June 2022 (encl 9 para 4) pursuant to s 3(1) ('(1) Any police officer may, without warrant, arrest and detain, for the purpose of investigation, any person in respect of whom he has reason to believe there are
H grounds which could justify his detention under subsection 6(1)') of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the DDSPMA') because he had reason to believe there are grounds for his detention under s 6(1) of the DDSPMA as the applicant has been or is associated with an activity relating to or involving trafficking in dangerous drugs and that in the
I interest of public order, he be detained:

> (1) Whenever the Minister, after considering —
>
> (a) the complete report of investigation submitted under subsection 3(3); and
>
> (b) the report of the Inquiry Officer submitted under subsection 5(4),

is satisfied with respect to any person that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs, the Minister may, if he is satisfied that it is necessary in the interest of public order that such person be detained, by order (hereinafter referred to as a 'detention order') direct that such person be detained for a period not exceeding two years.

See the notice and grounds of arrest in encl 3 exh VR1.

[4] On 24 June 2022, acting pursuant to s 3(2)(a) of the DDSPMA authority was given by Inspector of Police Vijay a/l Kumar to have the applicant detained beyond 24 hours (encl 8 para 6):

(2) Any person arrested and detained under this section may be detained in police custody for a period not exceeding sixty days without an order of detention having been made in respect of him under subsection 6(1):

Provided that

(a) he shall not be detained for more than twenty four hours except with the authority of a police officer of or above the rank of Inspector;

[5] According to the investigating officer, Inspector Tie Ngie Sieng, ('IO Inspector Tie') (encl 7 para 5), on the following day, 25 June 2022, authority was given by ASP V Sagaran pursuant to s 3(2)(b) of the DDSPMA for the purpose of detaining the applicant beyond 48 hours:

(b) he shall not be detained for more than forty eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent of Police;

[6] IO Inspector Tie deposed on affidavit (encl 7 para 7) that he had interviewed witnesses for the applicant's case on 28 June 2022 from 9am to 10am and from 2pm to 3pm as well as on 29 June 2022 from 9am to 10am and he found that:

(a) the applicant had been involved in the trafficking of dangerous drugs namely *syabu* containing methamphetamine, a scheduled dangerous drug;

(b) the applicant is involved with *a substantial body of persons* in his role as a person who recruits members in trafficking dangerous drugs (*syabu*) containing methamphetamine around Hutan Melintang, Perak;

(c) the applicant plans the distribution of dangerous drugs to foreign workers working as fishermen in Hutan Melintang, Perak; and

(d) the applicant acts as the head of the syndicate where he is the individual that sets the price for each drug sold with each transaction with customers arranged by him, and he paying the members of his group recruited for

purposes of trafficking in *syabu* containing methamphetamine.

[7] IO Inspector Tie gave a detailed account of the work carried out by him from 23 June 2022 up until when he completed his investigations and report on 12 July 2022 (encl 7) pursuant to s 3(3) of the DDSPMA:

> (3) The police officer making an investigation pertaining to a person arrested and detained under this section shall cause a copy of the complete report of the investigation to be submitted —
>
> (a) to an Inquiry Officer appointed under subsection 5(1); and
>
> (b) to the Minister,
>
> within such period as may be prescribed by the Minister by regulations made under this Act.

In between, he had reported the arrest and detention of the applicant to DSP Ahmad Nazeri bin Wahid ('DSP Nazeri') for purposes of detaining the applicant for a period of more than 14 days.

[8] DSP Nazeri in his affidavit (encl 10 para 4) confirmed having received the report from IO Inspector Tie on 1 July 2022 and that he studied the applicant's file containing documents, intelligence reports and recorded statements in connection with the applicant's activity in association with trafficking in dangerous drugs as defined in s 2 of the Dangerous Drugs Act 1952:

> In this Act, unless the context otherwise requires —
>
> 'dangerous drug' means any drug or substance which is for the time being comprised in the First Schedule;

From his review, he was satisfied that investigations under s 3(1) of the DDSPMA has yet to be completed and thus the detention of the applicant has to be extended for a period beyond 14 days (encl 10 para 5).

[9] Thus, on 1 July 2022, DSP Nazeri reported to ACP Shahidi bin Abdullah ('ACP Shahidi') on the arrest and detention of the applicant.

[10] ACP Shahidi in his affidavit confirmed receipt of the report from DSP Nazeri (encl 5 para 5) on 1 July 2022. After studying this report, he was satisfied that there are reasonable grounds for believing that there are grounds for the applicant to be detained pursuant to s 6(1) of the DDSPMA because the applicant together with *a substantial body of persons* has been associated with an activity relating to or involving trafficking in dangerous drugs as defined in s 2 of the Dangerous Drugs Act 1952.

[11] Thereafter, on 4 July 2022, ACP Shahidi prepared a report on the arrest and detention of the applicant and reported to the Minister of Home Affairs for purposes of extending the detention of the applicant for 14 days in compliance with the provisions of s 3(2)(c) of the DDSPMA (encl 5 para 7):

> (c) he shall not be detained for more than fourteen days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector General or to a police officer designated by the Inspector General in that behalf and the Inspector General or police officer so designated by him, as the case may be, shall forthwith report the same to the Minister.

[12] Continuing with the narrative, on 12 July 2022, Ashwini a/p Apalasamy ('inquiry officer Ashwini') in her affidavit (encl 6) deposed that she is the inquiry officer and that on 12 July 2022, she received the complete report pursuant to s 3(3) of the DDSPMA that was prepared by IO Inspector Tie which included statements recorded from witnesses including the applicant.

[13] In her affidavit, inquiry officer Ashwini gave a detailed daily account of her investigations commencing from her receiving the report and studying the same on 12 July 2022 (encl 6 para 11).

[14] On 13 July 2022, she carried out investigations including interviewing witnesses detained under the DDSPMA *via video* (encl 6 para 11(f)(ii) and she averred:

> Saya juga telah meneliti dan mengkaji fail kes Pemohon dan maklumat keterangan-keterangan yang relevan bagi maksud *mengenal pasti penglibatan Pemohon dalam aktiviti pengedaran dadah dan penglibatan Pemohon dalam sekumpulan besar orang.*

[15] To her credit, inquiry officer Ashwini worked daily on this matter involving the applicant including 16 July 2022 (Saturday) where she had to travel to Penang and 17 July 2022 which was a Sunday, to trace witnesses before completing and presenting her report on 18 July 2022 pursuant to s 5(4) of the DDSPMA to the second respondent:

> (4) An Inquiry Officer shall submit his report in writing to the Minister within such period as may be prescribed by the Minister by regulations made under this Act.

[16] In para 13 of her affidavit (encl 6), inquiry officer Ashwini deposed, inter alia, the following, which is material to the application under consideration by this court:

> Saya sesungguhnya menegaskan bahawa setelah meneliti hasil siasat yang telah dijalankan terhadap Pemohon dan saksi serta meneliti dan menimbangkan laporan lengkap penyiasatan di bawah Seksyen 3(3) Akta tersebut yang dikemukakan oleh

INSPEKTOR POLIS TIE NGIE SENG berkaitan dengan aktiviti-aktiviti Pemohon yang berhubungan dengan atau yang melibatkan pengedaran dadah Berbahaya, saya telah menyediakan satu laporan bertulis terhadap Pemohon untuk dikemukakan kepada Menteri Dalam Negeri di bawah Seksyen 5(4) Akta tersebut. Saya telah berpuas hati bahawa terdapat alasan-alasan yang munasabah untuk mempercayai bahawa Pemohon pernah ada kaitan dengan aktiviti yang berhubungan dengan atau yang melibatkan pengedaran dadah berbahaya seperti yang ditakrifkan di bawah Seksyen 2 Akta Dadah Berbahaya 1952 [Akta 234] iaitu mengedar dadah jenis Syabu yang mengandungi dadah berbahaya jenis methamphetamine seperti yang tersenarai di bawah Jadual Pertama, Bahagian III, Akta Dadah Berbahaya 1952 [Akta 234]. Pemohon terlibat di dalam *sekumpulan besar orang* dengan berperanan sebagai orang yang merekrut anggota dalam mengedar dadah jenis Syabu yang mengandungi dadah jenis methamphetamine di sekitar Hutan Melintang, Perak. Pemohon adalah orang yang membuat perancangan dalam mengedar dadah kepada orang warga asing yang bekerja sebagai nelayan di sekitar Hutan Melintang, Perak. *Pemohon bertindak sebagai Ketua Sindiket* iaitu:

i. Pemohon adalah individu yang menentukan harga barang bagi setiap dadah yang diedar;

ii. Setiap transaksi akan diuruskan oleh Pemohon dan Pemohon kemudiannya akan menyuruh orang suruhan untuk edar dadah tersebut;

iii. Setiap transaksi dikendalikan secara terus di antara Pemohon dan pelanggan-pelanggan;

iv. Pemohon memberi upah kepada ahli kumpulannya yang direkrut bagi tujuan mengedar dadah jenis Syabu yang mengandungi dadah berbahaya jenis methamphetamine.

Jelas peranan Pemohon yang mempunyai hierarki tinggi di dalam kumpulan/sindiket menunjukkan sebagai rantaian utama kepada sekumpulan besar orang yang terlibat dalam aktiviti pengedaran dadah seperti yang diperuntukkan dalam Perkara 149 Perlembagaan Persekutuan dan Mukadimah Akta tersebut.

[17] Inquiry officer Ashwini went on to depose in paras 15 and 16 of her affidavit (encl 6) that from her investigations, she was satisfied that the applicant *did not carry out the trafficking of dangerous drugs alone but as part of a substantial body of persons* as provided under art 149 of the Federal Constitution and the Preamble to the DDSPMA, and that from her narration of what she has done, she had inquired into the case of the applicant and had prepared her report to be delivered to the second respondent with all convenient speed.

Article 149 of the Federal Constitution:

(1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation:

(a) to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property; or

(b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or

(c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or

(d) to procure the alteration, otherwise than by lawful means, of anything by law established; or

(e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or

(f) which is prejudicial to public order in, or the security of, the Federation or any part thereof, any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

(2) A law containing such a recital as is mentioned in Clause (1) shall, if not sooner repealed, cease to have effect if resolutions are passed by both Houses of Parliament annulling such law, but without prejudice to anything previously done by virtue thereof or to the power of Parliament to make a new law under this Article.

NOTES:

Part XI:

The heading 'SPECIAL POWERS AGAINST SUBVERSION, ORGANIZED VIOLENCE, AND ACTS AND CRIMES PREJUDICIAL TO THE PUBLIC, AND EMERGENCY POWER' substituted for 'SPECIAL POWERS AGAINST SUBVERSION, AND EMERGENCY POWERS' by Act A442, section 5, in force 31-12-1978.

Art. 149:

The present Article was inserted by Act 10/1960, paragraphs 28(a) and (b), in force from 31–05–1960, and replaced the original Article which read as follows:

149. (1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation, to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property, any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, or 10, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

(2) A law containing such a recital as is mentioned in Clause (1) shall if not sooner repealed, cease to have effect on the expiration of a period of one year from the date

on which it comes into operation, without prejudice to the power of Parliament to make a new law under this Article.

Preamble to the DDSPMA:

Tajuk Panjang & Mukadimah

Suatu Akta bagi membuat peruntukan mengenai tahanan pencegahan orang yang ada kaitan dengan apa-apa aktiviti yang berhubungan dengan atau yang melibatkan pengedaran dadah berbahaya.

BAHAWASANYA tindakan yang memudaratkan ketenteraman awam di Malaysia telah diambil dan tindakan selanjutnya yang serupa diancam oleh sekumpulan besar orang di dalam dan di luar Malaysia;

DAN BAHAWASANYA Parlimen berpendapat adalah perlu tindakan itu dihentikan;

MAKA, OLEH HAL YANG DEMIKIAN, menurut Perkara 149 Perlembagaan MAKA INILAH

DIPERBUAT UNDANG-UNDANG oleh Seri Paduka Baginda Yang di-Pertuan Agong dengan nasihat dan persetujuan Dewan Negara dan Dewan Rakyat yang bersidang dalam Parlimen, dan dengan kuasa daripadanya, seperti yang berikut:

OBSERVATIONS

[18] The applicant did not reply to any of the averments of the respondents contained in the seven affidavits in reply filed by them.

[19] It is apparent that as at the time of the filing of the notice of motion on 18 July 2022, no order for the detention of the applicant has been made pursuant to s 6(1) of the DDSPMA.

THE APPLICANT'S CASE

[20] The applicant raised the following four issues in support of his application:

(a) non-compliance with the provisions of s 3(1) of the DDSPMA and art 5(2) of the Federal Constitution read together with the Preamble of the DDSPMA and art 149 of the Federal Constitution — the arrest of the applicant was not premised on any belief that 'the applicant's activities' involved a 'substantial body of persons':

Article 5(2):

(2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be

produced before the court and release him. A

(b) non-compliance with the provisions of s 3(2)(a) of the DDSPMA read together with the Preamble of the DDSPMA and art 149 of the Federal Constitution;

(c) non-compliance with the provisions of s 3(2)(b) of the DDSPMA read together with the Preamble of the DDSPMA and art 149 of the Federal Constitution; and B

(d) the investigations and report submitted by the police investigating officer (IO Inspector Tie) under s 3(3) of the DDSPMA were incomplete and are not in accordance with the requirements of the DDSPMA. C

[21] The applicant's assertions can be summarised as follows:

(a) the arrest of the applicant pursuant to s 3(1) of the DDSPMA was unlawful because at the time of his arrest, he was [not] informed by the arresting officer (ASP Sagaran) that he was being arrested because he was in association or is being involved in trafficking in dangerous drugs activities *together with a substantial body of persons*; D

(b) reliance is placed upon art 5(2) of the Federal Constitution but I believe that learned counsel meant art 5(3), but for ease of reading, the whole of art 5 is set out because art 5(1) and (2) are just as important: E

> 5 Liberty of the person
>
> (1) No person shall be deprived of his life or personal liberty save in accordance with law. F
>
> (2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him. G
>
> (3) *Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.*

(c) reliance is also placed on a body of case law laid down by, inter alia, the highest court of the land, namely the Supreme Court which was later re-named the Federal Court, which has consistently held that: H

(i) the power of arrest and detention has to be scrupulously complied with, so as to ensure that there is no abuse of the preventive detention law, and the person arrested and detained must be so detained in accordance with the modes of arrest and detention specified, see *Lei Meng v Inspektor Wayandiana bin Abdullah & Ors and other appeals* [2022] 3 MLJ 203; [2022] 3 CLJ 177 at paras [100] and [101]; I

(ii) if a detention is procured by steps which are not regular the court is empowered to set aside the detention order and this means that every step which is necessary for the making of the detention order is subject to review by the court, see *Muhammad Jailani bin Kasim v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2006] 6 MLJ 403; [2006] 4 CLJ 687 (SC) at para [8];

(iii) in matters which concern their personal liberty, the applicant is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty, see *Ex Parte Johannes Choeldi & Ors* [1960] 1 MLJ 184 at p 186 and cited with approval by our Supreme Court in *Ng Hong Choon v Timbalan Menteri Hal Ehwal Dalam Negeri & Anor* [1994] 3 MLJ 285; [1994] 4 CLJ 47 (SC); and

(iv) an arrest without information in hand would be an arrest without reason to believe and would be unlawful, see *Tee Yam @ Koo Tee Yam v Timbalan Menteri, Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2005] 5 MLJ 645; [2005] 6 CLJ 550 (HC).

(d) when the applicant was caused to be detained beyond 24 hours pursuant to s 3(2)(a) of the DDSPMA, Inspector Vijay a/l Kumar who authorised the detention did not make any averment that it was done for purposes of investigating the applicant for having associated or is being involved in trafficking in dangerous drugs activities *together with a substantial body of persons*;

(e) similarly, when the applicant was caused to be detained by ASP V Sagaran for a period for more than 48 hours pursuant to s 3(2)(b) of the DDSPMA there was no averment that it was done for purposes of investigating the applicant for having associated or is being involved in trafficking in dangerous drugs activities *together with a substantial body of persons*; and

(f) the report by IO Inspector Tie was clearly incomplete as there were material witnesses who could not be found for purposes of obtaining their material statements, and therefore such a report could not factually conclude that there was trafficking of dangerous drugs involving *a substantial body of persons.*

[22] Reliance was placed by the applicant on the case of *Muhamad Bilal bin Salim v Ketua Polis Negara, Malaysia & Anor* [2022] MLJU 1283 where at paras [26]–[28] Justice Roz Mawar Rozain JC held that:

> [26] This court finds that in authorising a further detention of more than 48 hours under s 3(2)(b) of the Act, the Assistant Superintendent of Police did not address his mind whether a longer detention period is needed to wrap up investigation concerning the accused's drug trafficking activities in connection with a substantial

body of persons. His affidavit is silent on this matter (encl 8). Likewise, with the affidavit of the investigating officer upon whose work and recommendation he had relied on — no mention of any involvement by a substantial body of persons (encl 12).

[27] To this court's mind, taking together art 149 of the FC, and the preamble of the Act, there seem to be non-compliance of s 3(2)(b) of the Act as the only point that is evident from the affidavits for the purpose of detaining the applicant more than 48 hours is an investigation into drug trafficking activities. It was not for the purpose of the Act which is for preventive detention of persons involved in drug trafficking activities in connection with a substantial body of persons which are prejudicial to public order.

[28] *This court rules that the mandatory requirement decided by the Federal Court as to the 'substantial body of persons' applies or culminates from the onset, which is from the point of arrest, through the detention during investigation and to the decision of detention. This must be one set standard applicable throughout when the Act is invoked.*

[23] The court was informed that there was no appeal against the decision of *Muhamad Bilal bin Salim.*

THE RESPONDENTS' CASE

[24] The respondents have grouped the first three of the four issues raised by the applicant into one, on the premise that they are inter-related (encl 16 para [4]), and that the three stages in s 3 of the DDSPMA namely that of: (i) s 3(1) regulates the day of the arrest; (ii) s 3(2)(a) regulates the power to detain for more than 24 hours from the time of the arrest; and (iii) s 3(2)(b) regulates the power to detain for than 48 hours from the time of arrest.

[25] Learned federal counsel asserted that s 3 is for the sole purpose of investigation and the need to prove the element of 'substantial body of persons' pursuant to the Preamble of the DDSPMA is premature.

[26] IO Inspector Tie in his affidavit (encl 7) explained that three days after the arrest of the applicant (on 23 June 2022), he had recorded the applicant's statement and it was only on 28 June 2022 that the first statement [was] taken from the first witness and this supports the respondents' assertion that investigations were ongoing.

[27] Further, after realising on 1 July 2022, which is nine days after the arrest (on 23 June 2022), that investigations could not be completed within 14 days, IO Inspector Tie requested for an extension of time for purposes of investigating the two elements of:

(a) the applicant's involvement with the activity of trafficking in dangerous drugs; and

(b) the applicant's association with a substantial body of persons.

[28] It was only after investigations were carried out that these two elements were satisfied, see the affidavit of ACP Shahidi (encl 5 para 6) and the affidavit of IO Inspector Tie (encl 7 para 13).

[29] As for the fourth issue raised by the applicant that the report of IO Inspector Tie is incomplete, and not made in accordance with the requirements of (s 3(3) of the DDSPMA), the respondents assert that it is baseless and made mala fide because IO Inspector Tie had in his report made findings that the applicant was involved with a substantial body of persons in the trafficking of drugs as can be seen his affidavit (encl 7 para 13).

[30] Further, there is no such requirement housed within s 3(2)(a) and (b) of the DDSPMA for all material witnesses to be first found and statements taken. Reliance is placed upon the case of *Lee Kew Sang v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2005] 2 MLJ 631; [2005] 3 CLJ 914 where the Federal Court held that:

> It is not for the courts to create procedural requirements because it is not the function of the courts to make laws or rules. If there is no such procedural requirement then there cannot be non-compliance thereof.

[31] The learned Federal Counsel, Mr Nuur Izham bin Ismail brought to the court's attention the case of *Muhammad Hafiz bin Abd Halim v Ketua Polis Negara, Malaysia & Anor* [2022] MLJU 1570; [2022] 1 LNS 1542 (HC) where Justice Roz Mawar Rozain JC in a similar application for a writ of habeas corpus which challenged the validity of the arrest made under s 3(1) of the DDSPMA accepted that an arrest premised upon a belief by the arresting officer that the applicant had been involved in an activity in association with or in the trafficking of dangerous drugs do not show any transgression of s 3(1) of the DDSPMA (see para [11] of the judgment). In other words, with respect, by necessary implication, Her Ladyship accepted that the omission of any mention that the applicant had been involved in the trafficking of dangerous drugs *with a substantial body of persons* did not render the arrest unlawful. Her Ladyship went further at para [15] to similarly hold that:

> As the investigation under s 3(1) of the Act is for detention under s 6(1) of the Act, this Court accepts that at this early point after arrest, the detention is for the investigation of drug trafficking activities involving substantial body of persons as required for an order under s 6(1) of the Act. So, the detention under s 3(2)(a) of the Act is regular.

[32] Nevertheless, the application for a writ of habeas corpus was granted in *Muhammad Hafiz bin Abd Halim* because the High Court held there was

inordinate delay by the inquiry officer in conducting the requisite inquiry under s 5(4) of the DDSPMA (see paras [23]–[33] and [39] of the judgment).

[33] Reliance is also made by the respondents on the case of *Kantha Rao a/l Subramaniam lwn Ketua Polis Negara, Malaysia dan satu lagi* [2022] MLJU 1942; [2022] 1 LNS 1898 (HC) where Justice Hasbullah Adam JC held that the statement of 'with a substantial body of persons' is one that is necessary only in the detention order issued pursuant to s 6(1) of the DDSPMA and said:

> [40] *Oleh yang demikian, mahkamah ini mendapati bahawa adalah pra-matang di peringkat tangkapan di bawah s 3(1) dan penahanan di bawah s 3(2) Akta tersebut untuk menentukan sama ada pemohon adalah sebahagian 'sekumpulan besar orang' yang terlibat dengan aktiviti pengedaran dadah berbahaya menurut keperluan di bawah perkara 149 Perlembagaan Persekutuan dan Mukadimah Akta tersebut.*
>
> [41] *Justeru, adalah dapatan mahkamah ini bahawa isu kegagalan membuktikan bahawa penangkapan pemohon melibatkan sekumpulan besar orang (substantial body of persons) dengan aktiviti pengedaran dadah adalah tidak mempunyai merit.*

[34] Nevertheless, the applicant in *Kantha Rao a/l Subramaniam* succeeded in his application for a writ of habeas corpus on the ground that he was [not] detained in a place authorised generally or specifically by the Minister pursuant to s 3(4) of the DDSPMA.

> (4) Any person detained under the powers conferred by this section shall be deemed to be in lawful custody, and may be detained in any prison, or in any police station, or in any other place authorised generally or specially by the Minister.

[35] The respondents asserted that the applicant's submissions that the failure by IO Inspector Tie to find other material witnesses would lead to an inference to be drawn in favour of the applicant that there was no evidence that could verify the applicant's involvement with a substantial body of persons in the trafficking of drugs is untrue. In fact, the report of inquiry officer Ashwini's supports the findings of IO Inspector Tie that the applicant is involved in the trafficking of drugs with a substantial body of persons.

[36] It was also brought to the court's attention by Mr Nuur Izham bin Ismail that the Minister of Home Affairs has appealed against the decisions in both *Muhammad Hafiz bin Abd Halim* and *Kantha Rao a/l Subramaniam* to the Federal Court.

COURT'S ANALYSIS AND FINDINGS

[37] By reason of the applicant having had his liberty restrained pursuant to the powers provided under the DDSPMA, a statute which has been interpreted by the Federal Court in *Selva Vinayagam a/l Sures v Timbalan Menteri Dalam*

Negeri, Malaysia & Ors [2021] 1 MLJ 601; [2021] 2 CLJ 29; [2021] 1 MLRA 83, it is only logical that the starting point for this court is to refer to this Federal Court authority.

[38] I am grateful to the learned editor of the esteemed law publisher CLJ (www.cljlaw.com), for his abstract which summarises neatly the ratio decidendi of the apex court.

[39] The abstract reads as follows:

> The Dangerous Drugs (Special Preventive Measures) Act 1985, otherwise Act 316, is a special specie of enactment on preventive detention enacted pursuant to art 149 of the Federal Constitution (FC) under which the fundamental liberties prescribed under arts 5, 9, 10 and 13 of the FC may be circumscribed. This said, in interpreting the Executive's power of detention under *s 6(1) of Act 316, the long title and preamble to the Act ought to be properly construed and given effect to as part of the Act. The construction must further have regard to ss 15 and 17A of the Interpretation Acts 1948/1967, the underlying object of the Act and the principle that any safeguard that the law provides for such detention must be liberally interpreted.*
>
> Bearing all these in mind, and notwithstanding that the words 'a substantial body of persons' appearing in the preamble of Act 316 can nowhere be found in s 6(1), *the object of Act 316 should be read into s 6(1)* in order to give the sub-section the meaning intended by Parliament. It follows, hence, that the power under s 6(1) may only be exercised if the following ingredients are set out in the grounds of the detention order and allegations of fact, namely, that: (i) the activity which has been taken or is being threatened by a substantial body of persons relates to or involves trafficking in dangerous drugs; (ii) the detenu is a member of a substantial body of persons; and (iii) the Minister is satisfied that it is necessary in the interest of public order that the detenu be subject to preventive detention. Be that as it may, since the detenu herein was acting alone, he cannot be caught by the ambit of Act 316. The detention order being a nullity, a writ of habeas corpus ought to issue to forthwith set the detenu at liberty.

[40] In line with the decision of the Federal Court in *Selva Vinayagam a/l Sures*, and with due respect to the contrary views expressed in *Muhammad Hafiz bin Abd Halim*, *Kantha Rao a/l Subramaniam* and to a limited extent, the finding of the High Court in *Muhamad Bilal bin Salim* at para [19] of the judgment, the object of the DDSPMA should be read into s 3 in order to give this section the meaning intended by Parliament. See also s 17A of the Interpretation Acts 1948 and 1967 (Consolidated And Revised 1989) Act 388.

[41] In my considered view, it logically follows that for purposes of s 3(1), 3(2)(a) and (b) of the DDSPMA, in any arrest and subsequent detention, two of the three key ingredients identified and held by the Federal Court in *Selva Vinayagam a/l Sures*, namely that:

(a) the activity which has been taken or is being threatened by a substantial body of persons relating to or involving trafficking in dangerous drugs; and

(b) the suspect is a member of a substantial body of persons,

form part of the object of the DDSPMA and should be read into s 3 of the DDSPMA in order to give it the meaning intended by Parliament.

[42] I find further support for such a construction by making reference to the minority decision of the Right Honourable Chief Justice, Tengku Maimun bt Tuan Mat, who after making reference to *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals* [2002] 4 MLJ 449; [2002] 4 CLJ 309 (FC), said in *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759 at para [40]; [2021] 5 CLJ 581 at para [215] that:

> ... the legality of a detention or detentions must be viewed as a *single* overarching transaction

[43] This approach was approved unanimously by the Federal Court in its later decision in *Lei Meng v Inspektor Wayandiana bin Abdullah & Ors and other appeals* [2022] 3 MLJ 203; [2022] 3 CLJ 177 and I would venture to add that it cannot be gainsaid that the detention of the applicant begins from the moment of him being arrested pursuant to s 3(1) of the DDSPMA, see also *Dhinesh a/l Tanaphll v Lembaga Pencegahan Jenayah & Ors* [2022] 3 MLJ 356; [2022] 5 CLJ 1 (FC) where Justice Nallini Pathmanathan FCJ in dealing with the Prevention of Crime Act 1959 said:

> [12] *It is untenable to utilise the extreme measures set out in legislation enacted pursuant to art 149 of the FC*, to deal with criminal offences which are more properly dealt with under the Penal Code, and other relevant legislation. It is incorrect to turn to emergency legislation to deal with ordinary criminal offences *in order to procure further evidence*, or because there is insufficient evidence to prosecute a person under the relevant criminal legislation dealing with that particular crime.

[44] In the instant case, as pointed out by learned counsel for the applicant, the applicant could have been dealt with under the Dangerous Drugs Act 1952 (Revised 1980).

[45] Justice Vernon Ong who gave a concurring speech for the majority in *Zaidi bin Kanapiah* said at para [176] (MLJ); para [139] (CLJ) on the power of arrest provided by s 3(1) of the Prevention of Crime Act 1959 ('the POCA') (revised-1983) Act 297 ('(1) A police officer may without a warrant arrest any person if he has reason to believe that grounds exist which would justify the holding of an inquiry into the case of that person under this act') which is substantially similar to s 3(1) of the DDSPMA that:

> ... This is important because the discretion of the police to arrest and to detain pursuant to a remand order is not absolute. *Put another way, the decision of a police officer, namely, whether he has the prerequisite 'grounds for believing' under an application for remand is objectively justiciable.*
>
> *That the police diary discloses sufficient facts and particulars to support the arresting officer's belief that 'grounds exist which would justify the holding of an inquiry into the case of the person arrested' under sub-s 3(1) of the POCA.* The ground should also corroborate the belief that the person is a member of any of the registrable categories under Part 1 of the First Schedule of POCA ...

[46] In the instant case, from the narrative distilled from the affidavits filed and set out above, the arrest made under s 3(1) of the DDSPMA followed by the subsequent detention of more than 24 hours pursuant to s 3(2)(a) of the DDSPMA, and the further detention of more than 48 hours pursuant to s 3(2)(b) of the DDSPMA, were all carried out without any evidence laid before this court that the applicant was arrested and detained by reason of he having associated or is being involved in trafficking in dangerous drugs activities together with *a substantial body of persons.*

[47] The first time, the element of the applicant having associated or is being involved in trafficking in dangerous drugs activities together with a substantial body of persons surfaced only at the stage when the applicant was detained for a further 14 days pursuant to s 3(2)(c) of the DDSPMA, see the affidavit of ACP Shahidi (encl 5 para 7).

[48] In my considered opinion, the structure of the legal detentive power in s 3 of the DDSPMA is expressed to be sequential in nature.

[49] It starts with the power given to any police officer of or above the rank of Inspector, without warrant, to arrest and detain followed by the legal power to incrementally increase the period of detention being vested upon a correspondingly higher rank of police officer.

[50] Only a police officer of or above the rank of Inspector can detain the suspect for more than 24 hours, see s 3(2)(a) of the DDSPMA.

[51] This is followed by only a police officer of or above the rank of Assistant Superintendent of Police who has the authority to have the suspect detained for more than 48 hours, see s 3(2)(b) of the DDSPMA.

[52] Thereafter, the suspect shall not be detained for more than 14 days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of arrest and detention to the Inspector General of Police ('IGP') or to a police officer designated by the IGP who shall forthwith

report the same to the Minister, see s 3(2)(c) of the DDSPMA.

[53] The inference to be drawn from the provisions of s 3 of the DDSPMA is clear. Parliament acknowledges the drastic power given to restrict the liberty of a subject without having to bring him to a court and has put in place safeguards by expressly providing that this power or arrest is placed in the hands of a police officer with the rank of at least that of an inspector, and authority for each incremental period of detention having to be sought from a correspondingly higher authority up till that of the Minister.

[54] Each sequential progression must be scrupulously complied with by those entrusted with such power and the exercise of this power within the framework of the preventive detention laws housed within the DDSPMA is objectively justiciable.

[55] In the instant case, whilst the element of having associated or is being involved in trafficking in dangerous drugs activities together with *a substantial body of persons* is present for the applicant's further detention for a further 14 days pursuant to s 3(2)(c) of the DDSPMA as can be seen in the affidavit of ACP Shahidi (encl 5 para 7), however, this element for purposes of his arrest, as well as his subsequent detention for more than 24 hours, followed by a further 48 hours was noticeably absent. It follows that his arrest and his subsequent detention is unlawful.

[56] There is, therefore, merit in his application for a writ of habeas corpus to be issued in his favour.

[57] For the reasons I have set out above, with respect, I find it unnecessary to refer to the other authorities that learned counsel for the applicant has referred to.

CONCLUSION

[58] Wherefore, I grant an order in terms of prayer 1 and as for prayer 2, I grant an order for part of the relief sought namely that a writ of habeas corpus be issued for the applicant to be released forthwith.

[59] As for the further relief sought in prayer 2 for an order that the applicant is not to be arrested once he is released, I had sought for clarification because no submissions were filed on this relief sought. Learned counsel for the applicant then addressed the court and said that he is withdrawing this part of the relief sought and for the avoidance of any doubt, this court with the agreement of counsel for the applicant had dismissed this part of the prayer and relief sought.

A *Applicant's application for writ of habeas corpus allowed.*

Reported by Dzulqarnain Ab Fatar

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